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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRIANNA NIKOL WILLIAMS, Defendant and Appellant.	A154013 (Contra Costa County Super. Ct. No. 51721653)

Rare is the criminal case in which the defendant and the People agree the trial court committed error that requires reversal of a conviction. This is one. For an unexplained reason, during deliberations and over defense counsel's objection, the trial court responded to a jury question with an instruction on a new theory of liability. The instruction was not only incomplete but also one the court had previously refused to give for lack of supporting evidence. To add insult to injury, the court then denied defense counsel's request to address the jury on this new theory. Defendant Brianna Nikol Williams was found guilty as charged five minutes after the court gave the jury this new instruction. Reversal is required to protect defendant's right to a fair trial.

BACKGROUND

In December 2017, the Contra Costa County District Attorney charged defendant with escape from custody by force or violence (Pen. Code, § 4532, subd. (b)(2)[1]). The district attorney specially alleged that defendant committed the offense while on probation (§ 1203.3), and that she had prior convictions which made her ineligible for

[1] All statutory references are to the Penal Code unless otherwise stated.

probation (§ 1203, subd. (e)(4)). Defendant pleaded not guilty and denied the special allegations. A jury trial on the escape charge followed and defendant waived jury trial on the special allegations.

The evidence presented at trial shows that defendant, as part of her sentence for a prior felony conviction, was permitted to apply to the Contra Costa County Electronic Home Detention (EHD) program. Program participants, under the supervision of a case manager, were allowed to go to work and sanctioned appointments, but were otherwise confined to their home. They were required to wear an ankle monitor at all times, the location of which was tracked. The monitor's strap was very strong, had fiberoptic cables in the middle and normally could only be compromised by being cut. EHD staff and sheriff's deputies in the field received notice of any tampering with the strap.

Vicki Pichon, an EHD enrollment specialist in the Contra Costa County Sheriff's Department, testified at trial. Upon reviewing her records, she testified that she had an intake meeting with defendant on November 18, 2016, at 2:30 p.m. or 3 p.m. Pichon said that, based on her typical conduct, she would have had defendant fill out and sign the EHD agreement documents and monitor equipment receipt, and at trial she reviewed those documents. Pichon also would have fingerprinted and photographed defendant. Another person then would have fitted defendant with an electronic ankle monitor. Pichon did not see defendant being fitted and did not notice when defendant left the EHD office. However, she said, EHD participants "do not leave our office prior to us getting confirmation from the monitoring company that the device is actually working."

Contra Costa County Deputy Sheriff Craig Shepherd testified that at 5:41 p.m. on November 18, 2016 (the day defendant was fitted with a monitor), he received a "strap alert" that a monitor strap associated with defendant had either been tampered with, cut or broken. The alert indicated the strap was located at an address that Pichon testified was defendant's residence address. Shepherd and his partner arrived at the address at 6:39 p.m. and found the monitor laying in the front yard, about 20 feet from the residence's front door. At trial, he identified a photograph of the monitor as it appeared after he collected it. He believed the monitor's strap had been cut based on the

unconnected straps he found, which he was shown at trial. He said they could be "push[ed] . . . back together like a piece of a puzzle." He and his partner searched the residence and did not find defendant there. He called whatever phone numbers were associated with defendant, did not reach her, left messages and did not receive a call back.

A warrant for defendant's arrest was issued on December 19, 2016. Ryan White, an Antioch police officer, testified that he and other officers went to an address for defendant in November 2017 with a warrant. Some of the officers knocked on the front door of what was a ground-floor apartment as White and a canine partner waited in the rear of the apartment house. White arrested defendant after she crawled out of a rear window of the apartment.

Mary Hooker, a sheriff's specialist for the Contra Costa County Sheriff's Department, testified that on January 9, 2018, she went to the West County Detention Facility for her work. She was in an area of the facility where inmates were allowed to walk around when defendant came over to speak to her. Defendant said her name and asked who she could talk to at the custody alternative facility about her case. Hooker told defendant she did not know anything about defendant's case and defendant said, " 'I cut my strap. My boyfriend got shot, and they wouldn't let me go, so I cut my strap.' " Hooker responded with some information and they did not talk further. Hooker wrote a brief incident report of the conversation on March 9, 2018, and sent it to the District Attorney's Office at that office's request.

After evidence was presented, the trial court rejected the prosecutor's request that it instruct the jury on aiding and abetting with CALCRIM Nos. 400 and 401 because, the court said, there was a lack of defense evidence that anyone else tampered with the strap. The court rejected the prosecutor's argument that the instruction should be given because, despite the lack of evidence, "the defense could potentially argue . . . the prosecution didn't show any evidence that said she picked up the scissors and cut it herself."

The court's instructions to the jury included CALCRIM No. 2761, which instructed on the charged crime of escape by force or violence in violation of

section 4532, subdivision (b)(2). The court also gave the jury CALCRIM No. 2760, which instructed on the lesser included offense of escape without use of force or violence.

After about an hour and a half of deliberations over two days, the jury sent two questions to the court, soon followed by a third. The court conferred with counsel in chambers and sent responses.

The jury's first question is not relevant to our inquiry. Its second question stated:

"This question is in reference to CALCRIM No. 2761. 'The People must prove that the defendant personally used force or violence.' We are curious if we need to take the word literally or if someone else potentially cut the ankle monitor, if that falls into the term 'personally,' as it was her personal device."

The court responded:

"This is not her 'personal device.' The question is did she personally, based on direct and circumstantial evidence, use force or violence in removing it."

The jury's third question stated:

"Can we deadlock on the First charge and still find the defendant guilty on the lesser included charge[?]"

The court responded:

"No, you must find her not guilty of the 1st charge, then you can go to the lesser."

About 30 minutes after the court provided these responses, the jury sent the following question to the court:

"Must it be proven that the defendant cut the strap herself for her to be guilty of this charge[?]"

The court and counsel again conferred in chambers. The court then sent the jury the following response:

"Please read CALCRIM [No.] 400 attached. And note The People must prove that the defendant personally used force or violence or aided & abetted another in using force or violence."

The attached CALCRIM No. 400 instruction stated:

"A person may be guilty of a crime in two ways: One, she may have directly committed the crime. I will call that person the perpetrator; two, she may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator."

The jury deliberated for five more minutes after receiving the court's response. It then returned a verdict of guilty on the charge that defendant escaped custody by force or violence.

After the jury returned its verdict, defense counsel stated that she had objected in chambers to the court instructing on aiding and abetting because no evidence supported this instruction. She also said giving CALCRIM No. 400 after closing argument was prejudicial and unfair, and that the court had denied her request to address the jury about the instruction. The prosecutor asserted, "The People believe that there was evidence to support the instruction, that being the ankle bracelet was cut and it was either cut by the defendant or cut by somebody that assisted the defendant, which only could have been done by the defendant aiding and abetting in that, so . . . ." The court did not explain why it had given the instruction.

At the sentencing hearing, the court found four of the six allegations of defendant's alleged prior convictions to be true. It granted defendant probation in the interest of justice under section 1203, subdivision (e)(4), but denied a defense request to reduce the felony to a misdemeanor because of defendant's lengthy criminal history. Among other things, it placed defendant on three years of formal felony probation, ordered her to serve 364 days in county jail, with 254 days of credit for time served.

Defendant filed a timely notice of appeal. During the pendency of this appeal, defendant filed a motion for calendar preference, which is denied as moot.

DISCUSSION

Defendant argues her conviction must be reversed because the trial court prejudicially erred by instructing the jury during deliberations on aiding and abetting liability although no evidence supported this theory, failed to instruct on the elements that had to be proven under this liability theory, and denied her counsel's request to address

the jury regarding the theory. The People agree that reversal is required because of the trial court's failure to instruct the jury on the elements and its refusal to allow defense counsel to address the jury on the theory. We reverse for two reasons asserted by both defendant and the People.

First, the trial court committed instructional error. Such a claim is a question of law that we review de novo. (*People v. Fenderson* (2010) 188 Cal.App.4th 625, 642.) "All criminal defendants have the right to 'a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt,' " and, therefore, "[t]he trial court has a sua sponte duty to instruct the jury on the essential elements of the charged offense." (*People v. Merritt* (2017) 2 Cal.5th 819, 824.) More specifically, a trial court instructing a jury on an aiding and abetting theory must, among other things, instruct that the defendant can only be found guilty if the evidence indicates that he or she had the specific intent to aid the perpetrator's crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560–561 (*Beeman*).) The trial court instructed the jury with only CALCRIM No. 400, a general instruction about aiding and abetting that does not contain a description of the elements that must be proven under that theory. These are contained in CALCRIM No. 401, which the court did not give to the jury. CALCRIM No. 401 states that the jury, in order to convict a defendant on an aiding and abetting theory, must find beyond a reasonable doubt that (1) the defendant knew the perpetrator intended to commit the crime; (2) before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime; and (3) the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. (CALCRIM No. 401.) The failure to instruct the jury about the specific intent necessary to find a defendant guilty on an aiding and abetting theory is "*Beeman* error," which is of a federal constitutional magnitude. (*People v. Prettyman* (1996) 14 Cal.4th 248, 271.) The trial court committed this error.[2]

[2] Although the record does not indicate the defense objected to the omission of CALCRIM No. 401, "it is well settled that no objection is required to preserve a claim for

Defendant argues that, while the court's *Beeman* error was prejudicial under harmless error analysis, such an analysis is unnecessary because "[t]his is one of those rare cases of structural error," since the court's omission of the elements of aiding and abetting vitiated all of the jury's findings. We need not decide whether this was structural error in light of our conclusion that at the very least the error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 23–24. The jury indicated in its questions to the court that it was having difficulty determining whether defendant was criminally liable under the instructions given to it. It specifically indicated in its third note that it was close to or at a deadlock on the issue. Further, its fourth question indicated it was divided over whether the evidence showed that defendant cut the strap herself. Nonetheless, the jury reached a verdict of guilty five minutes after the trial court responded by providing it with CALCRIM No. 400's aiding and abetting instruction. Also, we cannot say the evidence of defendant's liability as the perpetrator is so strong that the error was harmless, given that this liability would have to be significantly based on the testimony of EHD specialist Hooker that defendant admitted cutting the strap, the credibility of which clearly troubled the jury. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181 [noting that it is the exclusive province of the trier of fact to determine the credibility of a witness and to resolve evidentiary inconsistencies].) Based on these procedural facts and the evidence, we at the very least cannot conclude the court's error was harmless beyond a reasonable doubt. Reversal is in order because of this error alone.

Second, the trial court should have given the defense an opportunity to address the jury on this new aiding and abetting theory. A court may in its discretion give a supplemental instruction to the jury after closing argument. (*People v. Ardoin* (2011) 196 Cal.App.4th 102, 127–128.) In such an event, "[t]o prevent unfair prejudice, if a supplemental instruction introduced a new matter for consideration by the jury, the

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appellate review that the jury instructions omitted an essential element of the charge." (*People v. Mil* (2012) 53 Cal.4th 400, 409.)

parties should be given an opportunity to argue the theory. [Citations.] 'The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant the right to the effective assistance of counsel at all critical stages of the proceedings.' [Citation.] ' "To effectuate the constitutional rights to counsel and to due process of law, an accused must . . . have a reasonable opportunity to prepare a defense and respond to charges." [Citation.]' If supplemental or curative instructions are given by the trial court without granting defense counsel an opportunity to . . . if necessary, offer additional legal argument to respond to the substance of the new instructions, the spirit of section 1093.5[3] and the defendant's right to a fair trial may be compromised." (*Id.* at p. 129.)

The trial court's error in denying the defense request to address the jury was prejudicial. Its aiding and abetting instruction introduced a new theory of liability to the jury. The defense could not have expected it because the court had previously refused the prosecution's request to give this instruction for lack of evidence to support it. Thus, the defense had no reason to and did not address it in closing argument. Under these circumstances, the court's denying defense counsel's request to address the jury compromised defendant's right to a fair trial. (Compare *People v. Ardoin*, *supra*, 196 Cal.App.4th at pp. 129–134 [finding no prejudicial error in denying defense the opportunity to address the theory of a supplemental instruction because the defense had notice the prosecution might pursue the subject theory, the trial court had not given any misleading assurance that the instruction would be excluded, and the prosecution had alluded to the theory in closing argument].)

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[3] Section 1093.5 states: "In any criminal case which is being tried before the court with a jury, all requests for instructions on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument. Before the commencement of the argument, the court, on request of counsel, must: (1) decide whether to give, refuse, or modify the proposed instructions; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given. However, if, during the argument, issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof."

Defendant also argues the trial court erred in giving any aiding and abetting instruction because no evidence supported it, but concedes that we need not reach this issue if we reverse on other grounds. The People assert whether evidence supported the theory was a "close call" because a reasonable juror could have concluded that the strap was so strong that it required force defendant did not physically have to remove it by herself. The record indicates the monitor strap was "strong" and Officer White testified that he thought it had been cut. However, there is nothing more in the record about the strength of the strap, the type of tool required to cut it, or the physical characteristics of the strap or the defendant. Also, should there be a retrial, there may well be additional evidence on these and other related matters presented. Therefore, we decline to reach this issue now.

DISPOSITION

The judgment is reversed and the matter is remanded for a possible retrial.

STEWART, J.

We concur.

KLINE, P.J.

MILLER, J.

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